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Nos. 01-226 and 01-230

In the Supreme Court of the United States

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

CITY OF GREENWOOD VILLAGE, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidentiary record supports the Federal Aviation Administration's finding that an airport's ban on scheduled passenger service was not a lawful exercise of its proprietary powers, warranted by safety concerns and civil aviation needs.

2. Whether the ban on scheduled passenger service relates to a route or service within the meaning of 49 U.S.C. 41713(b) (1994 & Supp. V 1999).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22)[1] is reported at 242 F.3d 1213. The final decision of the

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 01-226. "Arapahoe Pet." and "Greenwood Pet." refer to the petitions for a writ of certiorari filed by the Arapahoe County Public Airport Authority and the City of Greenwood

Federal Aviation Administration (Pet. App. 23-59) is published at 1999 WL 499647.

JURISDICTION

The court of appeals entered its judgment on March 9, 2001. Petitions for rehearing were denied on May 7, 2001 (Pet. App. 60-61). The petition for a writ of certiorari in No. 01-226 was filed on August 3, 2001. The petition for a writ of certiorari in No. 01-230 was filed on August 6, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. No. 97-248, Tit. V, 96 Stat. 671 (49 U.S.C. 47101 *et seq.*), authorizes the Federal Aviation Administration (FAA or the agency) to grant federal funds to public airports for construction and other improvement projects. The FAA may approve such grants only after receiving "written assurances" that airport sponsors will comply with numerous statutory requirements. 49 U.S.C. 47107(a) (1994 & Supp. V 1999). As pertinent here, an airport must assure that it "will be available for public use on reasonable conditions and without unjust discrimination," and that "a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport." 49 U.S.C. 47107(a)(1) and (4). See also 49 U.S.C. 40103(e) (prohibiting grant of "an exclusive right to use an air navigation facility on which Government money has been expended").

"To ensure compliance with" the statutory grant requirements, Congress directed the FAA to

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Village, Colorado, respectively. "Greenwood Pet. App." is the appendix to the petition for a writ of certiorari in No. 01-230.

"prescribe requirements for [airport] sponsors that the [FAA] considers necessary" and authorized the agency to "approve an application for a project grant only if the [FAA] is satisfied that [those] requirements * * * have been or will be met." 49 U.S.C. 47107(g)(1)(A) and (2). The FAA has accordingly developed a standard set of assurances by which a recipient of an AAIA grant must abide. 62 Fed. Reg. 29,761 (1997).[2] For instance, under Standard Assurance 22a, an airport sponsor agrees to "make its airport available * * * for public use on reasonable terms and without unjust discrimination, to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport." *Id.* at 29,766. An airport "may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." *Ibid.* (Standard Assurance 22i). If an airport violates the statute or a grant assurance, the FAA may seek enforcement in federal district court, or it may conduct an administrative proceeding and issue any orders necessary to carry out the airport grant program. 49 U.S.C. 47111(f), 47122(a); see 14 C.F.R. Pt. 16.

2. Before 1978, the airline industry was subject to extensive economic regulation by the former Civil Aeronautics Board (CAB). Airlines that sought to

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[2] Petitioners erroneously cite to the grant assurances set forth in 14 C.F.R. Pt. 152, App. D. That part, however, applies to grants under the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Tit. I, 84 Stat. 219, which was superseded by the AAIA. See 14 C.F.R. 152.1. The grants at issue in this case were awarded under the AAIA. See Greenwood Pet. App. 107a.

change their routes, the cities they served, and the fares they charged were required to obtain CAB approval. See H.R. Rep. No. 1211, 95th Cong., 2d Sess. 2 (1978). Congress changed that system when it enacted the Airline Deregulation Act of 1978 (ADA) and determined that the public interest would best be served by, *inter alia*, "maximum reliance on competitive market forces" and "entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." 49 U.S.C. 40101(a)(6) and (13).

To ensure that state and local governments would not supplant federal deregulation with their own economic "reregulation," see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992), and to "prevent conflicts and inconsistent regulations," H.R. Rep. No. 1211, *supra*, at 16, the ADA added a "Preemption" provision. 49 U.S.C. 41713(b)(1). It prohibits states and political subdivisions from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." *Ibid.* As the CAB explained when implementing this provision, "[c]learly, states may not interfere with a [federally-certificated] carrier's decision on * * * which markets to serve." 44 Fed. Reg. 9948, 9951 (1979).

The ADA's preemption provision does not limit a state or political subdivision that owns or operates an airport "from carrying out its proprietary powers and rights." 49 U.S.C. 41713(b)(3). The exercise of such proprietary powers must nevertheless be "reasonable, *nondiscriminatory*, nonburdensome to interstate commerce, and designed to accomplish a legitimate State

objective in a manner that *does not conflict with the provisions and policies of the [ADA].*" 14 C.F.R. 399.110(f) (emphasis added).[3]

3. The Arapahoe County Public Airport Authority (the Airport Authority) owns and operates Centennial Airport, a public use airport near Denver that serves as a "general aviation reliever airport." Greenwood Pet. App. 64a.[4] Since 1983, the Airport Authority has applied for and received approximately $18.6 million in "discretionary" federal funding under 49 U.S.C. 47115, to be used for airport construction and improvement projects. Greenwood Pet. App. 107a-108a. To obtain this money, the Airport Authority provided the required, standard grant assurances to the FAA, including those prohibiting exclusive rights and unjust economic discrimination against classes of service. Pet. App. 24.

Operations at Centennial Airport have historically consisted of unscheduled commercial charter and air-taxi passenger and cargo service. Those operations are limited to aircraft with 30 or fewer seats because the Airport does not hold an FAA certificate under 14 C.F.R. Pt. 139 authorizing operations by larger aircraft. Greenwood Pet. App. 66a. The Airport Authority has acknowledged, however, that "scheduled or unsched-

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[3] See 49 U.S.C. 40113(a) (authorizing the Secretary of Transportation and the FAA to "prescrib[e] regulations" that they consider necessary to carry out their responsibilities under federal aviation law).

[4] "General aviation" is commonly understood to mean private and corporate operations. See 49 U.S.C. 47134(m) (Supp. V 1999). A "reliever airport" is an airport designated by the FAA "to relieve congestion at a commercial service airport and to provide more general aviation access to the overall community." 49 U.S.C. 47102(18).

uled" service by aircraft with 30 or fewer seats "may not be prohibited," and that it must consider "[r]equests for scheduled air service." *Id.* at 66a, 67a.

4. In 1985, Centennial Express Airlines (CEA) initiated discussions with the Airport Authority about commencing scheduled passenger service in small aircraft at Centennial Airport. Pet. App. 24. The Airport Authority, however, imposed a moratorium on its consideration of any such requests in April 1993. *Id.* at 26. CEA formally applied for permission to conduct scheduled passenger service the following month. The Airport Authority did not approve the application, and, on September 8, 1994, it adopted a policy resolution totally banning scheduled passenger service. *Ibid.*

CEA nevertheless began scheduled passenger service with one six-passenger aircraft between Centennial Airport and Dalhart, Texas, on December 20, 1994, pursuant to the limited authority it held under an FAA certificate. Two days later, in Arapahoe County district court, the Airport Authority obtained a temporary restraining order against CEA, which was later converted to a permanent injunction. Pet. App. 26-27.

5. In the meantime, on December 23, 1994, the U.S. Department of Transportation (DOT) sent a letter to the Airport Authority (in response to the Authority's earlier inquiry), explaining that "it was arbitrary to exclude a particular class of service for factors not reasonably related to the impacts of that service." Pet. App. 26-27. DOT stressed the limited nature of the service that CEA sought (and was authorized by the FAA) to provide, and it concluded that the Airport Authority "had not proved that the number of passengers or operations * * * would warrant a ban on scheduled service." Greenwood Pet. App. 128a.

6. In January 1995, CEA filed a complaint with the FAA, alleging that the Airport Authority's ban on scheduled service was unlawful. Pet. App. 27. CEA also appealed the state court injunction to the Colorado Court of Appeals, which unanimously reversed the injunction. *Arapahoe County Pub. Airport Auth.* v. *Centennial Express Airlines, Inc.*, 942 P.2d 1270 (Ct. App. 1996), rev'd 956 P.2d 587 (Colo. 1998). The court held that, "because the prohibition of scheduled passenger service at the Airport is related to airline prices, routes, and services, the Authority's regulation is preempted under 49 U.S.C. § 41713(b)(1) (1994)." *Id.* at at 1273. The court declined to decide whether the ban on scheduled service falls within the proprietary powers exception to the ADA's preemption provision, ruling that that determination should be made in the first instance by the FAA, before which CEA's complaint was already pending. *Id.* at 1275-1277.

In a split decision, the Colorado Supreme Court reversed. *Arapahoe County Pub. Airport Auth.* v. *Centennial Express Airlines, Inc.*, 956 P.2d 587 (1998) (Pet. App. 62-112). Three of the seven Justices joined a plurality opinion; *id.* at 63-85; one Justice concurred and concurred specially; *id.* at 85-90; two Justices dissented; *id.* at 90-112; and one Justice did not participate. *Id.* at 63. The lead opinion first held that it was not appropriate to defer to the FAA, which was not a party to the state court litigation. *Id.* at 71-74. The plurality next held that the Airport Authority's ban on scheduled service is not preempted by federal law because it does not "relate[] to a price, route, or service" within the meaning of 49 U.S.C. 41713(b)(1). Pet. App. 78. The plurality further concluded that, in any event, the Airport Authority's ban is "a valid exercise of its proprietary powers" under 49 U.S.C. 41713(b)(3), and thus

is not preempted by federal law for that additional reason. Pet. App. 81.

Turning to the conditions attached to the Airport Authority's receipt of federal grant money, the plurality found no violations. In its view, the Airport Authority's ban on scheduled service does not violate the requirement that the Airport be made available for public use without unjust discrimination because "the ban on scheduled passenger service applies to all airport users equally." Pet. App. 82-83. The plurality concluded that the ban on scheduled passenger service "is necessary to ensure the safe operation of the airport," because allowing such service "promise[s] to bring increased aviation traffic to an already congested airport." *Id.* at 83. The plurality also stated that "[i]ncreased passenger traffic also requires additional facilities such as a terminal, security and baggage systems, which are currently lacking at Centennial. Without these facilities, the airport would become unsafe for passenger use." *Ibid.* Lastly, the plurality concluded that requiring Centennial Airport to allow scheduled passenger operations would affect its role as a general aviation reliever airport. *Id.* at 83-84.

Justice Scott concurred and concurred specially. He expressly relied on the fact that the FAA had not yet acted, and assumed for purposes of disposing of the state court litigation that the FAA would have the power to preempt the Authority's policy and to enforce the conditions on the FAA's grants to the Authority. Pet. App. 86, 87-88 & n.1.

7. Several months after the Colorado Supreme Court issued its ruling, the FAA's Director of Airport Safety and Standards issued a decision concluding that the Airport Authority's ban on scheduled service violates its grant assurances and the statutory proscrip-

tions of unjust discrimination, exclusive rights, and local regulation of air carrier routes and service. Greenwood Pet. App. 106a-162a. The Director ordered the Airport Authority to submit a plan describing how it will eliminate those violations; in addition, until such plan is approved, the Airport Authority would be ineligible to apply for future grants. *Id.* at 161a-162a.

The Airport Authority requested and obtained a hearing. In his Initial Decision, the Hearing Officer concluded that the evidence and law supported the Director's determination that the Airport Authority's ban on scheduled passenger service violates federal law and grant assurances. Greenwood Pet. App. 60a-105a.

The Airport Authority and the City of Greenwood Village, Colorado, which had been allowed to intervene in the administrative proceeding, appealed. On February 18, 1999, the FAA issued its Final Agency Decision and Order, affirming the Initial Decision. Pet. App. 23-59. Noting that the agency had not been a party to, or in privity with the parties to, the state court litigation, the FAA rejected arguments that collateral estoppel barred litigation of the issues in the administrative proceeding. *Id.* at 40-45. It also concluded that the Airport Authority had failed to demonstrate that its scheduled service ban is necessary because of either safety concerns or civil aviation needs. *Id.* at 49-56.

With respect to safety, the agency found that the Airport Authority had failed to explain "how a terminal and baggage system are necessary for passenger safety," and it noted that "there is no legal requirement for security screening for the type of operation [CEA] proposed." Pet. App. 50. The FAA stressed that, while the Airport Authority has banned all scheduled service, "it permits the same sizes and types of aircraft to carry passengers in *unscheduled* operations." *Ibid.* (emphasis

added). The FAA further observed, in connection with the Authority's concern about fire safety, that "the fire department response time is no different for passengers in unscheduled operations than it is for passengers in scheduled operations." *Id.* at 51. Moreover, all operations, "whether scheduled or unscheduled, would be conducted by pilots tested and licensed by the FAA, would use aircraft certificated by the FAA for airworthiness, would follow FAA operating rules, and would follow the direction of FAA air traffic controllers." *Ibid.* The FAA also rejected the Airport Authority's claim that concerns about congestion prompted its ban on scheduled service. The FAA explained that the Authority had not only failed to show that it considered other alternatives to deal with possible congestion, it had conceded during discovery that "congestion, capacity, and environmental effects were not among the reasons for its ban on scheduled passenger service." *Id.* at 51-52.

The FAA found a similar lack of evidence to support the Airport Authority's argument that the scheduled service ban was necessary to serve civil aviation needs. The agency found that the claim that scheduled operations would change the character of Centennial Airport was "speculative," and there was no evidence suggesting that such operations would reduce general aviation use of the airport. Pet. App. 53-54. The FAA also explained that scheduled service is fully consistent with Centennial's primary function as a reliever airport, and it noted that numerous predominantly general aviation airports, including some that do not hold Part 139 certificates authorizing operations by larger aircraft, allow scheduled passenger service. *Id.* at 52 n.31, 53. In fact, the FAA pointed out, "the Denver Regional Aviation System Plan itself recognizes that an airport may be

required by its grant obligations to accept service that is inconsistent with its primary purpose." *Id.* at 54. And, in keeping with the goals of the ADA, "[i]f the public does not want or need scheduled passenger service at Centennial Airport, market forces will lead to that result." *Ibid.*

Because the Airport Authority had failed to satisfy its burden of proving that its ban on scheduled passenger service is required for either the safe operation of the airport or civil aviation needs, the FAA concluded that the ban does not fall within the Authority's reserved "proprietary powers" under 49 U.S.C. 41713(b)(3). Thus, it concluded, federal law preempts the Airport Authority's ban on scheduled service. Pet. App. 57.

The agency declined to decide what effect a 1996 federal law, which requires airports to hold a Part 139 certificate for scheduled passenger operations using aircraft with more than nine seats, would have here. The FAA explained that the issue was not presented by the facts of this case, inasmuch as the Airport Authority's ban on scheduled service was total, and the operation that CEA actually conducted used only a six-seat aircraft. Pet. App. 57 n.42.

The FAA therefore ruled that the Airport Authority is in violation of 49 U.S.C. 47107(a)(1) and Grant Assurance 22, prohibiting unjust economic discrimination; 49 U.S.C. 47107(a)(4) and 40103(e) and Grant Assurance 23, prohibiting exclusive rights; and 49 U.S.C. 41713, prohibiting local regulation of air carrier prices, routes, or services. Pet. App. 58. The agency directed the Airport Authority to file a corrective action plan and determined that, until such a plan is approved, the Authority is ineligible to apply for new federal grants. *Ibid.*

8. The Airport Authority petitioned for review of the FAA's decision, raising solely three "errors of law": (1) the Colorado Supreme Court's decision is binding on the FAA; (2) the Airport Authority—not the FAA—is responsible for determining whether its own ban on scheduled passenger service is required for the safe operation of the airport and for civil aviation needs; and (3) any scheduled passenger service must be limited to operations using aircraft with nine or fewer seats. Pet. App. 7-8. The Airport Authority did not challenge any of the factual findings made by the FAA. *Id.* at 3 n.1.[5]

The court of appeals unanimously affirmed the FAA's decision. Pet. App. 1-22. At the outset, it held that the FAA was not required to give preclusive effect to the Colorado Supreme Court's judgment for several reasons. *Id.* at 9. First, the Tenth Circuit stressed that the primary issue in the state court litigation was the propriety of the injunction prohibiting CEA from conducting scheduled passenger operations at the airport in violation of the Authority's own policy. "To the extent the Colorado Supreme Court addressed federal preemption issues and the Authority's obligations under the federal grant assurances, it did so in the narrow context of rejecting [CEA's] defenses." *Id.* at 10. Moreover, the court of appeals pointed out, the state supreme court's conclusion that the Airport Authority had not violated federal grant assurances "lacks the

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[5] Greenwood intervened, raising issues not raised by the Airport Authority. Assuming, but explicitly not deciding, that Greenwood's intervention was proper, the court of appeals held that there were no extraordinary circumstances that would justify Greenwood's presentation of issues not brought before the court by the Authority as petitioner. Pet. App. 6-7 n.4. Greenwood does not seek review of that ruling in its petition before this Court. Greenwood Pet. i.

depth and breadth of analysis given to those same issues" by the three levels of administrative review at the FAA. *Ibid.* In addition, the court noted that the state supreme court was seriously divided, with only three of the seven justices joining the plurality decision. *Ibid.* "Last, but certainly not least, the FAA was not a party to, nor in privity with a party to, the state court proceedings." *Id.* at 11.

The court of appeals next concluded that determining whether the Airport Authority had complied with the conditions imposed on it by federal aviation law and under the terms of its federal grant agreements is a federal matter. If the state court's ruling were deemed preclusive, it "would frustrate the FAA's ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances." Pet. App. 14.

The court of appeals then turned to the Airport Authority's claim that its ban on scheduled passenger service is within its proprietary powers and is justified by safety concerns and civil aviation needs. Preliminarily, the court "easily conclude[d]" that the ban on scheduled passenger service "relates to both services and routes" within the meaning of the preemption provision, 49 U.S.C. 41713(b)(1). Pet. App. 16. The court next "assume[d], without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the 'proprietary powers'" exception to the preemption provision. *Id.* at 18. The court explained, however, that whether the Airport Authority's total ban on scheduled passenger service is justified by safety or civil aviation needs is a "factual" determination that the Authority had the burden of proving.

Id. at 19. Given the deference due the FAA's findings,[6] and based on its own "careful review of the administrative record," the court found "a dearth of evidence to support the Authority's claim that the ban on scheduled service is necessary due to ground congestion, operational safety and environmental impact concerns." *Ibid.* See *id.* at 19-21 & n.10. The court therefore held that the Airport Authority had "exceeded its legitimate scope of power as a state or local government" under 49 U.S.C. 41713(b)(3), and its ban on scheduled service is peempted by federal law. Pet. App. 21.

Finally, the court of appeals declined to decide what effect the 1996 statutory amendment, requiring airports to hold Part 139 certificates for operations by aircraft with more than nine seats (see 49 U.S.C. 44706(a)(2) (Supp. II 1996)), might have on this case. Like the FAA, the court concluded that that issue was "not presented by the facts in this case." Pet. App. 22.

ARGUMENT

1. The Airport Authority presents the question whether an airport proprietor, pursuant to the "proprietary powers" exception to the preemption provision in 49 U.S.C. 41713(b), may ban scheduled passenger service when "necessary for the safe operation of its airport or to serve the civil aviation needs of the public." Arapahoe Pet. i. Greenwood presents essentially the same question. Greenwood Pet. i (Question 2). The court of appeals correctly resolved that issue, and further review is not warranted.

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[6] Under 49 U.S.C. 46110(c), the FAA's findings of fact are "conclusive" if supported by substantial evidence.

The Authority and Greenwood suggest that the court of appeals erroneously concluded, as a matter of law, that the Authority's prohibition of scheduled service is not within the scope of its proprietary powers. See Arapahoe Pet. 11, 12; Greenwood Pet. 4, 26-30. The arguments of the Airport Authority and Greenwood, however, reflect a fundamental misunderstanding of the court of appeals' ruling.

The court of appeals explicitly "assume[d], without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the 'proprietary powers' umbrella." Pet. App. 18. The FAA's standard grant assurances also recognize that an airport "may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." 62 Fed. Reg. at 29,766 (Standard Assurance 22i). See also 14 C.F.R. 399.110(f) (exercise of proprietary powers must be "reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective" in a manner that does not conflict with ADA). Thus, there is no dispute in this case that, as a *legal* matter, it is possible for an airport that receives federal funding to prohibit certain passenger service, if such action is required for safety or civil aviation needs.

The Airport Authority and Greenwood, however, have overlooked the essence of the court of appeals' ruling. The determination whether safety concerns or civil aviation needs justified the ban on scheduled passenger service was "a factual one for which the Authority, as the party asserting the justification, [bore] the burden of proving before the agency." Pet. App. 19. The court of appeals' ruling was based on the "dearth of

evidence to support the Authority's claim that the ban on scheduled service is necessary due to ground congestion, operational safety and environmental impact concerns," and on the Authority's "fail[ure] to demonstrate" how the ban would serve the needs of civil aviation. *Id.* at 19, 21. Not only did the court find substantial evidence to support the FAA's findings in this regard (see *id.* at 49-56), its own "careful review of the administrative record" revealed that the testimony on behalf of the Airport Authority was "largely speculative" and "effectively rebutted" by the FAA's evidence. *Id.* at 19, 20. Petitioners do not seek review of that assessment of the factual record by the court of appeals, and that fact-bound issue would not in any event warrant review by this Court.[7]

Indeed, the Airport Authority did not directly dispute the FAA's factual findings in the court of appeals. See Pet. App. 3 n.1, 7-8. As the Authority concedes (Arapahoe Pet. 15), it simply relied instead on statements in the plurality opinion of the Colorado Supreme Court to the effect that the "ban on scheduled passenger service is necessary to ensure the safe operation of the airport" and to serve the needs of civil aviation. Pet. App. 83. Those statements, however, lack support with citations to any evidence in the record.[8] More

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[7] In keeping with its well established practice of not granting certiorari "to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), the Court considers whether substantial evidence supports an administrative agency's findings of fact only in "'the rare instance when [that] standard appears to have been misapprehended or grossly misapplied' by the court below," *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981).

[8] Cf. Pet. App. 110, 111 n.9 (Bender, J., dissenting) (noting lack of factual development and findings in the state court litigation).

important, as the court of appeals held, those statements were not binding on the FAA—which was not a party to the state court litigation—or entitled to any preclusive effect, as the Airport Authority had urged. *Id.* at 15; see *id.* at 8-14. Neither the Airport Authority nor Greenwood challenges that particular ruling here. Even if they did, the court of appeals' ruling is correct. It is well established that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989) (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)).

Nor is there a conflict even on the underlying factual issue. The Colorado Supreme Court plurality reached its conclusion based on the record before it, and it was not reviewing an FAA decision. The Tenth Circuit reached its conclusion based on a different record, and based on its obligation to defer to FAA findings that are supported by substantial evidence. There is therefore no true conflict between Tenth Circuit and the Colorado Supreme Court plurality on that factual issue, much less a conflict that would warrant this Court's review. That is particularly true since only three of the seven Justices on the Colorado Supreme Court concluded that the FAA would not have authority to reach a different conclusion. Pet. App. 11.

2. The Authority also errs in contending that the agency's decision "requires [it] to expand and build * * * scheduled passenger service facilities." Arapahoe Pet. 14; see also *id.* at 15, 18.[9] In the admini-

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[9] In this connection, the Airport Authority cites out of context an October 1999 FAA Task Force Study. Arapahoe Pet. 14-15, 18. That study was prepared months after the FAA decision at issue,

strative proceeding, it was the Airport Authority that insisted that a terminal, baggage claims system, and security screening were necessary for safety reasons. Pet. App. 49. The FAA explicitly rejected those claims, noting that the Authority had failed to explain why such facilities were necessary or required. *Id.* at 50 & nn.25 & 26.[10]

With respect to safety and the airport's facilities in general, the agency also pointed out that "[t]he airport already has weight limits for its runways that would keep out aircraft that are too large to operate safely." Pet. App. 50 n.27.[11] Further, while the Airport Authority bans scheduled service, "it permits the same sizes and types of aircraft to carry passengers in unscheduled operations." *Id.* at 50.[12] As for fire safety, the FAA

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is not part of the administrative or court of appeals record, and has no relevance here.

[10] For example, aircraft size determines whether security screening is required, and, under current FAA regulations, the carrier, not the airport, ordinarily provides such screening. Pet. App. 50 n.26. Bills pending before Congress would, if enacted, have the potential to alter current screening requirements and responsibilities, but would still not transfer responsibility for passenger screening to airport operators.

[11] The Airport Authority intimates that the FAA's decision would require it to obtain a Part 139 certificate, which would allow aircraft with more than 30 seats to conduct operations at Centennial Airport. See 14 C.F.R. 139.1. Neither the agency's decision nor the law supports that suggestion. See 49 U.S.C. 44706(f) (Supp. II 1996) ("Nothing in this title may be construed as requiring a person to obtain an airport operating certificate if such person does not desire to operate an airport described in subsection (a).").

[12] See also Pet. App. 95 n.4, 107 (Bender, J., dissenting) (noting that numerous carriers conduct unscheduled operations at Cen-

observed that "the fire department response time is no different for passengers in [those] unscheduled operations than it is for passengers in scheduled operations." *Id.* at 51. Finally, "all operations at the airport, whether scheduled or unscheduled, would be conducted by pilots tested and licensed by the FAA, would use aircraft certificated by the FAA for airworthiness, would follow FAA operating rules, and would follow the direction of FAA air traffic controllers." *Ibid.*

The FAA likewise addressed the Airport Authority's concern "that permitting scheduled passenger service would conflict with Centennial Airport's designation as a general aviation reliever airport, and that the FAA should defer to regional and local planning." Pet. App. 53. The agency found that "[t]he initiation of scheduled passenger service at Centennial Airport is unlikely to change the predominantly general aviation role of the airport" (*ibid.*), and claims to the contrary were simply not supported by the record (see *id.* at 53 & nn.33 & 34). If Centennial's role as a reliever airport were ever undermined by scheduled passenger service, however, alternatives other than a total ban on such service should be attempted first. *Id.* at 54.[13] The FAA also noted that "the Denver Regional Aviation System Plan itself recognizes that an airport may be required by its grant obligations to accept service that is inconsistent with its primary purpose." *Ibid.*

Thus, the FAA's decision neither requires the Airport Authority to construct or expand any facilities nor alters Centennial's status as a general aviation reliever

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tennial Airport similar to the scheduled service that CEA sought to provide).

[13] See, *e.g.*, Pet. App. 53 n.33 ("the Airport Authority has taken no significant actions to limit overall growth").

airport. Rather, the Authority is obliged to develop and submit a plan explaining how it will comply with federal laws and previously agreed upon grant conditions, and, until it does so, it is not entitled to apply for any additional federal grants. This remedy provides the Authority with substantial discretion in developing a corrective action plan.

3. The Airport Authority requests the Court to establish "a standard * * * by which lower courts may determine when a matter truly impacts the national aviation system as opposed to being a matter of proprietary power." Arapahoe Pet. 16. Greenwood makes a similar request. Greenwood Pet. 25. There is no indication that the lower courts are experiencing the kind of difficulty distinguishing between the two that would warrant this Court's review. Further, this case does not present an appropriate occasion for resolution of any such general issue. As previously explained, the court of appeals "assume[d], without deciding," that the scope of an airport's proprietary powers may be sufficient to encompass the power to ban scheduled passenger service, where the record establishes that such a ban is justified by safety concerns or the needs of civil aviation. Pet. App. 18. Thus, the court of appeals' decision is attributable to the Airport Authority's failure to prove such justification, not to the court's failure to define the Authority's powers broadly enough.

4. Greenwood presents an additional question, asking the Court to resolve an alleged "inconsistency" or "potential contradiction" between *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), and *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995). Greenwood Pet. 21, 22; see also Pet. i (Question 1). There is, however, no such inconsistency.

a. In *Wolens*, the Court examined the ADA's preemption provision, which prohibits States and political subdivisions from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. 41713(b)(1).[14] The Court held that this provision "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 222. In doing so, the Court overturned a state court judgment that permitted a class action complaint about an airline's frequent flyer program to proceed under a state consumer fraud statute. *Id.* at 226.

The Court in *Wolens* found no need to "dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services," 513 U.S. at 226, inasmuch as it had recently addressed that matter in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992). *Morales* explained that the phrase "relating to" in the ADA's preemption provision "express[es] a broad pre-emptive purpose." *Id.* at 383. Thus, the Court held, *id.* at 384, that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted under [49 U.S.C. 41713(b)(1)]."[15] Applying that principle to

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[14] At the time of the *Wolens* litigation, the preemption provision appeared at 49 U.S.C. App. 1305(a)(1) (1988). Federal aviation laws were officially codified and renumbered "without substantive change" in 1994. Act of July 5, 1994, Pub. L. No. 103-272, § 1(a), 108 Stat. 745.

[15] In rendering this broad interpretation, the *Morales* Court specifically rejected the argument that the provision "only preempts the States from actually prescribing rates, routes, or services." 504 U.S. at 385.

the facts of *Morales*, the Court concluded that enforcement guidelines issued by state attorneys general regarding allegedly deceptive airline fare advertising clearly "'relate[d] to' airline rates," 504 U.S. at 388, and thus were preempted by the ADA, *id.* at 391. Similarly, in *Wolens*, 513 U.S. at 226, the Court concluded that plaintiffs' frequent flyer complaints related to an airline's "rates" and "services."

Unlike *Morales* and *Wolens*, which involved the ADA's preemption provision, *Travelers* addressed the preemption provision in a different statute—the Employee Retirement Income Security Act of 1974 (ERISA), which states that ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by the statute. 29 U.S.C. 1144(a). The Court in *Travelers* held that a state law that required hospitals to collect surcharges from patients whose insurance coverage was purchased by employee health-care plans governed by ERISA did not "'relate to' employee benefit plans within the meaning of ERISA's pre-emption provision." *Travelers*, 514 U.S. at 649. Citing neither *Morales* nor *Wolens*, *Travelers* focused on "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656.

Thus, there is no inconsistency between *Wolens* and *Travelers*. The cases involved different statutes with different purposes, and the issues resolved in the two cases were unrelated to each other.

b. In the state court litigation, CEA argued that the Authority's ban on scheduled passenger service was preempted by the ADA, 49 U.S.C. 41713(b)(1). The Colorado Supreme Court plurality discussed *Morales*, *Wolens*, and *Travelers*, and, despite the fact that *Morales* and *Wolens* involved the ADA, it concluded

that *Travelers* provided the most relevant guidance. Pet. App. 75-77. Disregarding this Court's explicit instruction in *Morales*, 504 U.S. at 383, that the phrase "related to a price, route, or service of an air carrier" in ADA Section 41713(b)(1) be given a "broad" interpretation, the state court concluded that the ban on scheduled passenger service does not "relate to" airline services "because it does not concern typical service-oriented tasks such as ticketing, boarding procedures, providing meals and drinks to passengers, and baggage handling." Pet. App. 78. The Colorado Supreme Court plurality likewise concluded that "the Authority is not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge or where they can fly." *Ibid.*

In contrast, the Tenth Circuit, citing *Morales* and *Wolens*, "easily conclude[d that] the Authority's ban is connected with and relates to both services and routes." Pet. App. 16. The court explained that, "[b]y banning scheduled passenger service, the Authority has affirmatively curtailed an air carrier's business decision to offer a particular service in a particular market." *Id.* at 16-17. Moreover, the ban affects route determinations "because the carrier cannot conduct regular operations over any route involving the banned airport." *Id.* at 17.

As Greenwood points out (Greenwood Pet. 20-21, 23), the court of appeals and Colorado Supreme Court plurality reached different conclusions on the meaning of the preemption provision. For several reasons, however, that disagreement does not warrant this Court's review.

First, the court of appeals is clearly correct. Its interpretation is supported by the plain meaning of the preemption provision and this Court's authoritative construction of that provision. In contrast, the Colorado

Supreme Court plurality ignored both the plain meaning of the provision and this Court's construction of it, and instead applied a decision that interpreted a preemption provision of a different statute.

Second, that issue was neither raised nor briefed by the parties in the court of appeals. See Pet. App. 7-8 (identifying the three errors of law raised by the Authority in its appeal); *id.* at 6 n.4, 8 n.6 (describing the issues raised by Greenwood); *id.* at 17-18 ("the Authority largely evades a direct discussion of the preemption issue in its briefs to this court").[16] The court of appeals therefore addressed the issue only briefly and as a prelude to the issues actually before it.

Third, as the court of appeals in this case noted, only three of the seven Justices on the Colorado Supreme Court concluded that the Authority's ban against scheduled passenger service was not preempted by federal law. Pet. App. 11; see pp. 7, 8, *supra*. Now that the FAA has determined that the Authority's ban violates federal law and the Authority's own assurances, there is no reason to believe that even the plurality of the Colorado Supreme Court would necessarily reach the same conclusion in the future.

Fourth, these are the first two decisions of which we are aware that address the application of the preemption provision to a prohibition against scheduled service. Particularly since the first decision was rendered without the benefit of the FAA's views, and the second decision was rendered without briefing on the issue, that issue would benefit from further

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[16] Indeed, the appellate briefs and rehearing petitions filed by the Airport Authority and Greenwood do not discuss or even cite *Morales*, *Wolens*, or *Travelers*.

ventilation in the lower courts. Review at this time therefore would be premature.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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